

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:08-CR-00017-FL-1
No. 2:11-CV-00041

This matter is before the court on the Memorandum and Recommendation (“M&R”) of United States Magistrate Judge William A. Webb, regarding petitioner’s motion and amended motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (DE # 60, 63), recommending that petitioner be resentenced pursuant to United States v. Simmons, 649 F.3d 237 (4th Cir. 2001), and that petitioner’s remaining claims under § 2255 be denied.

The magistrate judge determined that petitioner improperly received a sentence enhancement under 21 U.S.C. § 851 and as a career offender, where the prior convictions upon which the government relied for the enhancement and career offender status were not felony convictions. (M&R at 2-3). As noted in the M&R, the government agrees that petitioner should be resentenced pursuant to Simmons, and that the enhancement under 21 U.S.C. § 851 should not apply and that petitioner's career offender designation should be reexamined. See Gov. Response to Mot. to Vacate at 5. No objections to the M&R have been filed, and petitioner has filed a response in

support of the M&R. This matter is ripe for ruling.

The court hereby ADOPTS the recommendation of the magistrate judge as its own, and, for the reasons stated therein, plaintiff's motion is GRANTED IN PART and DENIED IN PART. Plaintiff's motion based upon Grounds One, Two and Three is DENIED, and plaintiff's motion based upon Simmons is GRANTED. The clerk of court is directed to set this matter for resentencing hearing on November 6, 2012 in New Bern, North Carolina.

So ordered, this the 15th day of October, 2012.



LOUISE W. FLANAGAN
United States District Judge